

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.58 OF 2005

IN

SUM.SUIT NO.2647 OF 1998

Mahindra & Mahindra Ltd. ..Plaintiff.

V/s.

NEPC Micon Ltd. ..Defendant.

Ms.Mohana Nair, for Plaintiff.

Mr.G.Khinkhabwala i/b Mulla & Mulla for defendant.

CORAM: A.M.KHANWILKAR, J

DATE : JULY 25, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings.

2. This application is for revocation of leave granted by this court under clause XII of the Letters Patent in favour of the plaintiffs. Leave under clause 12 of the Letters Patent was granted in view of the assertion made in the plaint in paragraph 26 to the effect that the entire negotiations for availing of Bill Discounting facility from the plaintiffs have taken place in Mumbai. It is further stated that the plaintiff had disbursed funds in Mumbai; Part payment of the Defendant's obligation

have also taken place in Mumbai. On this basis, it was stated that substantially the whole of the cause of action has arisen within the territorial jurisdiction of this Hon'ble Court. It is further mentioned in paragraph No.26 that one cheque was issued at Chennai and was deposited at the plaintiff's ANZ Grindlays Bank, Chennai Branch account and registered office of the defendant company is situated at Chennai. In other words, it was mentioned that part of cause of action is outside the jurisdiction of this court, for which leave under clause XII of the Letters Patent was obtained. That prayer was granted by this court.

3. By the present application, the defendant asserts that no part of cause of action has arisen in Mumbai, within the jurisdiction of this Court. According to the defendant, all the relevant documents between the parties allegedly executed in Mumbai including Bills of Exchange dated 6th November, 1995 at page 39 Exh.B-4 to 5, those documents have been executed and stamped at Madras. Besides, promissory note executed by the defendant was at Madras and it clearly mentions that all disputes are subject to Madras (India) Jurisdiction only. Reliance is also placed on the invoice dated

October 25, 1995, which refers to similar clause that all disputes are subject to Madras (India) Jurisdiction only. Reliance is also placed on the letter Exh."C" dated February 5, 1996, which contains the similar clause that all disputes are subject to Madras (India) Jurisdiction only. On the above basis, it was contended that plaintiff has availed the benefit as per the offer made by the defendant and did not register any protest with regard to the exclusive jurisdiction clause, referred to in the documents, namely, promissory notes, invoice as well as letters sent by the defendant. Therefore, it was not open to the plaintiff to invoke jurisdiction of this court; and in fact, this court will have no jurisdiction to entertain the suit as parties have agreed to the exclusive jurisdiction of Madras court.

4. To support the submission, reliance is placed on the decisions of the Apex Court in the cases of **Hakam Singh V/s. Gammon (India) Ltd., AIR 1971 S.C.740**, in case of **M/s.Angile Insulations V/s. M/s Davy Ashmore India Ltd., AIR 1995 S.C.1766** and lastly in case of **Hyderabad Municipal corporation V/s. M.Krishnaswami Mudaliar and Mudaliar and Anr., (1985) 2 S.C.C.9**. Reliance is also placed on Section 8 of the Contract Act and Section 115 of the Evidence Act

by the counsel for defendant to support the above submissions.

5. In the affidavit in support of this application, the only assertion made to contest the jurisdiction of this court can be discerned from paragraph No.2 and 3 of the affidavit dated 19th January, 2004. It is stated that the documents filed by the defendant being Bills of exchange, on which alleged claim of the plaintiffs is based, were subject to Madras Jurisdiction only. Such condition is found in other documents. Besides, it is stated that monies were payable at Madras and the defendants have paid some of amounts at Madras to the plaintiff. It is asserted that no part of cause of action has arisen within the jurisdiction of this court.

6. Having considered the rival submissions and going through the record and pleadings, to my mind, there is no substance in the application preferred by the defendant. In the plaint in paragraph No.26, it is clearly asserted that the registered office of the plaintiff is in Mumbai. Besides, the negotiations for availing of Bill Discounting facility from the plaintiff have taken place in Mumbai and plaintiff had disbursed funds in Mumbai and part payment has

taken place in Mumbai. As this position is indisputable, it follows that part of cause of action has arisen in Mumbai; the leave granted by this court under clause XII cannot be taken exception to.

7. To overcome this difficulty, it is contended that the documents on which reliance is placed by the plaintiff, would suggest that the parties had agreed that all disputes to be made subject to Madras(India) Jurisdiction only. In this context, reliance was placed on the decision of the Apex court. Indeed, in the case of Hakam Singh(Supra), the Apex Court has observed that where two courts or more have jurisdiction under the code of Civil Procedure to try a suit or proceedings, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. However, the court to which parties have agreed to submit to its jurisdiction could alone be entitled to try the dispute between those parties. Reliance was also placed on the decision in the case of M/s Angile Insulations(supra) to contend that where there may be two or more competent courts to entertain the suit, parties to the contract can agree to vest jurisdiction in one such court to try the dispute and if such agreement is entered into, it is

not open for any other court to entertain the dispute between the parties.

8. There can be no quarrel with the abovesaid propositions. However, what is overlooked by the Defendant is that there is no clear and unambiguous contract between the parties to submit to the jurisdiction of Madras court only. According to the defendant, there was contract between the parties as can be discerned from the documents on which the plaintiff has later on acted upon by accepting the amount which, clearly mentions that all disputes are subject to Madras (I) Jurisdiction only. Reliance is placed on the invoice dated October 26, 1995 Exh.B-5, letters sent by defendant dated October 25, 1995 Exh. B-7 and dated 5th February, 1996 Exh.C. However, I find substance in the submission canvassed on behalf of the plaintiff that incorporation of such clause (regarding jurisdiction of a particular court) in the printed letters cannot bind the plaintiff. The Apex Court in the case of **M/s.Angile Insulations (supra)** has observed that agreement regarding the jurisdiction of court has to be clear and unambiguous. The primary document which was executed by the plaintiff is bills of exchange Exh. B-4. Indeed, this document is executed and stamped at

Madras. But the same makes no reference to the jurisdiction of Madras court only. If it is so, as there is no clear agreement between the parties, printed condition referred to in the documents subsequently sent by the defendant to the plaintiff, cannot bind the plaintiff to invoke the jurisdiction of Madras court only.

9. The counsel for the defendant would then place reliance on Section 8 of the Contract Act to contend that as the plaintiff has not registered any protest with regard to the printed condition mentioned in the subsequent documents regarding jurisdiction of Madras court and having acted upon the promissory note and availed of the benefit thereunder, will be bound by the printed condition therein, in terms of Section 8 of the Contract Act r/w Section 115 of the Evidence Act.

Section 8 of the Contract Act reads thus:

8. Acceptance by performing conditions, or receiving consideration.-Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Section 115 of the Evidence Act reads thus:

115. Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

In my opinion, however, neither Section 8 or Section 115 referred to above will be of any avail. In the first place, the ouster of jurisdiction of any court cannot be assumed on the basis of the conduct of the parties. In the fact situation of the present case, it is open to contend that the court at Madras also had the jurisdiction to try and decide the dispute between the parties. That however, does not mean that this court had no jurisdiction at all though substantial part of cause of action has arisen within the jurisdiction of this court. The converse view could be possible only when it is shown that there is express, clear and unambiguous agreement between the parties to submit to the jurisdiction of Madras Court only.

10. Reliance was then placed on the decision in the case of **Hyderabad Municipal corporation (supra)** In my view, this decision of the Apex Court is of no avail to the defendant. Decision of the Apex Court

in **Hyderabad Municipal Corporation case (supra)** is exposition on the fact situation of the case before it. In that case, government called upon the contractor to complete contract between specified time. The Government did not intimate to the respondent-plaintiff that no extra payment on account of increased rate would be paid to him or he will have to complete work on the basis of original rates. It is also mentioned in the said decision that in fact, no reply was sent by the Government and a studied silence was maintained by the Government in regard to the plaintiff's demand for extra payment, in spite of several reminders in that behalf, till the plaintiff actually completed the work during the spread over period and only on completion of work by the plaintiff, they submitted final bill on the basis of increased rates, the Government disputed its liability to pay additional payment.

11. In the present case, parties will be primarily governed by the suit document which is bills of exchange dated November 6, 1995 Exh.B-4. That document makes no reference to exclusive jurisdiction of Madras court in case of any dispute between parties. The documents on which reliance is placed by the defendant are posterior to the Bills of

Exchange and there is nothing on record to even remotely suggest that the plaintiff has expressly acknowledged or accepted the printed condition referred to in the said documents, namely, promissory note, invoices and letters sent by the defendant. The fact that the plaintiff has availed the benefit under the promissory note will not by itself, result in plaintiff having clearly, expressly and unambiguously agreed to the printed condition in the later documents; as is required to oust the jurisdiction of any court of competent jurisdiction. This view is supported by the exposition of the Apex court in the case of **Angile Insulations(supra)**, which decision, however, is relied by the defendant.

12. Viewed in this perspective, there is no substance in the objection taken with regard to the leave granted under clause XII. As mentioned earlier, the only assertion in the affidavit in support of this application is that there are documents on record such as promissory note, invoices and letters, in which, it is specified that all disputes will be subject to Madras(India) Jurisdiction only. I have already concluded above that such printed condition will not bind the Plaintiff muchless oust the jurisdiction of this

court in absence of an express, clear and unambiguous agreement in that behalf. Reliance is also placed by the defendant on the circumstance, that the cheque was issued by the defendant in favour of the plaintiff which was presented and payable at Madras. Besides, the plaintiffs had presented the said cheque to their banker for realisation at Madras. That does not mean that no part of the cause of action has arisen within the jurisdiction of this court. On the other hand, the assertion made in paragraph 26 of the plaint that the entire negotiations for availing of Bill Discounting facility from the Plaintiff have taken place in Mumbai and the plaintiff had disbursed funds in Mumbai; Part payments of the defendant's obligation have also taken place in Mumbai, has remained unchallenged. If it is so, as there is no express, clear or unambiguous agreement between the parties to oust the jurisdiction of this court, by no stretch of imagination, the order granting leave under clause XII in favour of the plaintiff can be taken exception to.

13. Hence this chamber summons is dismissed with costs.